




FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission
Staff Director
General Counsel
Press Office
Public Disclosure

FROM: Commission Secretary 

DATE: April 20, 2012

SUBJECT: Comment on Draft AO 2012-08
(Repledge)

Transmitted herewith is a late submitted comment from Noah Ornstein on behalf of Repledge.

Draft Advisory Opinion 2012-08 is on the agenda for April 26, 2012.

Attachment



FEDERAL ELECTION
COMMISSION
SECRETARIAT

2012 APR 20 P 2:08
April 20, 2012

Via Facsimile and Email

Ms. Shawn Woodhead Werth
Secretary & Clerk
Federal Election Commission
999 E Street, NW
Washington, DC 20463
Fax: (202) 208-3333

Re: Comments on Draft Advisory Opinions 2012-08 A and B (Repledge)

Dear Ms. Werth,

These comments are filed on behalf of Repledge in response to Draft Advisory Opinions 2012-08 A and B, which have been issued in response to a request for an advisory opinion from Repledge (AOR 2012-08).

Draft A (Agenda Doc. 12-21) approves of the activities proposed by Repledge. Draft B (Agenda Doc. 12-21-A) concludes that a contribution from a Repledge member to a political committee would cause Repledge to violate the prohibition on a corporation "facilitating the making of contributions to candidates or political committees" at 11 CFR 114.2(f). Draft B, if adopted, would prohibit Repledge from launching a web-based platform that seeks to turn political contributions into charitable donations.

The plain language of 11 CFR 114.2(f), and the Commission's precedent interpreting the regulation, compel the Commission to adopt Draft A, which would permit Repledge to proceed with the activities described in AOR 2012-08. First, Repledge will not be engaged in fundraising in connection with any federal elections. Second, Repledge's provision of "certain electronic transactional services that are essential to the flow of modern commerce" do not meet the threshold for facilitation. Third, to the extent the Commission concludes that Repledge is facilitating the making of contributions, Repledge's activities fall within the "commercial vendor" exception. For all of these reasons, Repledge respectfully urges the Commission to adopt Draft A.

Introduction

The narrow legal question that the drafts differ upon is: Would a Repledge member's contribution to a political committee cause Repledge to violate the

prohibition on a corporation "facilitating the making of contributions to candidates or political committees" in 11 CFR 114.2(f)(1).

A corporation must meet three criteria in order to violate the prohibition on facilitating the making of contributions to candidates or political committees. First, the corporation must be engaged in fundraising in connection with any federal election. 11 CFR 114.2(f)(1). Second, the corporation must facilitate the fundraising by using corporate owned resources or facilities to engage in the fundraising. *Id.* Third, the organization must not fit within the exemption provided for commercial vendors who facilitate fundraising, but do so in the ordinary course of business for a commercially reasonable fee. 11 CFR 116.1(c).

Repledge does not violate the prohibition on a corporation "facilitating the making of contributions to candidates or political committees" contained in 11 CFR 114.2(f)(1) because Repledge is not engaged in fundraising. We do not seek to raise funds for any candidate. Repledge's purpose is to divert contributions away from political candidates and committees and towards charities.

If the Commission determines that Repledge is engaged in fundraising, Repledge still does not violate the prohibition on corporate facilitation because the service that Repledge provides does not reach the threshold for facilitation as defined by the Commission's precedent. Repledge is not engaged in the type of facilitation activities contemplated by the law and promulgated by the regulations. In addition, the Commission has repeatedly stated that organizations that provide "certain electronic transactional services that are essential to the flow of modern commerce" do not meet the threshold for facilitation. AO 2011-06 (Democracy Engine). These are the type of services that Repledge provides. Repledge does not meet the threshold for facilitation required to violate the prohibition at 11 CFR 114.2(f).

Even if the Commission determines that Repledge is engaged in fundraising, and the Commission decides that Repledge is facilitating the making of contributions, then Repledge still does not violate the prohibition on corporate facilitation because it falls within the "commercial vendor" exception. Drafts A and B both incorrectly state: "Repledge will not provide any services to political committees. It will, instead, provide services to its customers." Draft A at 13 n.4 (emphasis added); Draft B at 14-15 n.5 (emphasis added). Repledge made clear in AOR 2012-08 that it "will be providing federal committees with the very limited service of providing a platform for sending contributions to federal committees that are not successfully diverted to charities." AOR 2012-08 at 12. Again, Repledge will not be engaged in "fundraising" but, nevertheless, to the extent the Commission deems Repledge to be facilitating the making of contributions, Repledge will be doing so "in the ordinary course of business, at a usual and normal charge"—charging the recipient committee for this limited service.

For all of the foregoing reasons, Repledge does not violate the prohibition on corporate facilitation of contributions.

1. Repledge does not violate the prohibition on corporate facilitation of contributions because Repledge is not engaged in fundraising.

Commission regulations prohibit corporations and labor organizations "from facilitating the making of contributions to candidates or political committees." 11 CFR 114.2(f)(1). Facilitation is defined as "using corporate or labor organization resources or facilities to engage in fundraising activities in connection with any federal election." 11 CFR 114.2(f)(1). To engage in facilitation an organization must first engage in fundraising. Because Repledge does not engage in fundraising, it cannot engage in facilitation.

Draft B incorrectly concludes that Repledge is engaged in fundraising, stating: "[A]lthough Repledge's business model contemplates diverting funds away from political committees and to charitable organizations, in essence it serves as an elaborate fundraising device." Draft B at 14.

Draft A, in contrast, correctly concludes: "Repledge does not propose to engage in fundraising for candidates" but that Repledge will "provide services at the request and for the benefit of its members[.]" This service is not fundraising because Repledge's services allow members to join supporters of opposing candidates to refrain from making contributions and to direct the funds to charitable organizations.

Indeed, the very purpose of Repledge is to reduce the amount of money that is contributed to political committees. Repledge is not "an elaborate fundraising scheme" as stated in Draft B, because the most likely outcome of a member making a pledge through Repledge is that the candidate will receive significantly less than the amount of the initial pledge—or, in Repledge's preferred scenario, no contribution at all. In all scenarios the candidate will receive a pledge that has been reduced by 2 fees: the commercially reasonable transaction fee taken by Repledge, and the processing fee taken by the payment processor selected and retained by Repledge. Furthermore, in all Fund Drives, all pledges intended for one of the candidates will be donated to charity. A platform that provides a service for its members that prevents most contributions from reaching a political candidate or committee is not engaged in fundraising for political candidates or committees.

Any conclusion by the Commission that Repledge's dedication and effort to divert funds away from political committees to charities constitutes "facilitating the making of contributions to candidates or political committees" under 11 CFR 114.2(f)(1) we believe is contrary to both the spirit and language of the prohibition. We respectfully urge the Commission to adopt Draft A, and find that

Repledge would not be engaged in fundraising and therefore would not in violation of 11 CFR 114.2(f)(1).

2. Repledge does not violate the prohibition on corporate facilitation of contributions because Repledge does not facilitate the making of contributions.

If the Commission finds that Repledge is engaged in fundraising, then we urge the Commission to find that Repledge does not violate the prohibition on corporate facilitation of contributions because Repledge only provides electronic transactional assistance that does not meet the legal threshold for "facilitation." See AOs 2011-06 (Democracy Engine) and 2006-08 (Brooks).

Although Commission regulations prohibit corporations and labor organizations "from facilitating the making of contributions to candidates or political committees," 11 CFR 114.2(f)(1), a corporation may assist the making of a contribution without violating the prohibition on corporate facilitation if the corporation only provides electronic transactional services that are essential for modern day commerce. See AO 2011-06 (Democracy Engine) (citing AO 2006-08 (Brooks)).

Repledge is not engaged in the kind of facilitation contemplated by 11 CFR 114.2(f)(1), and described in the regulation's Explanation and Justification (E&J). See Corporate and Labor Organization Activity; Express Advocacy and Coordination With Candidates, Final Rules and Explanation and Justification, 60 Fed. Reg. 64260, 64264 (Dec. 14, 1995).

As the Commission explains in the E&J, "facilitation" occurs, for example, if a corporation or labor union directs their employees to work on a fundraiser for a candidate or makes corporate facilities such as offices, copiers, and telephones available for a candidate or political committee, and does not do so for community or civic groups. 60 Fed. Reg. at 64264. Facilitation also occurs when telephones and copiers are used by a campaign committee staff for a fundraiser and the corporation or union is not reimbursed in a timely fashion. *Id.*

Repledge is plainly not engaged in the type of facilitation contemplated by the Commission when it promulgated 11 CFR 114.2(f)(1). Instead, Repledge assists in the diversion of contributions from political committees to charities and, to the extent contributions are nevertheless made to political committees, Repledge merely provides its users with certain electronic transactional services. For those contributions that are made, Repledge, through the payment processor that it retains and directs, provides a service for fee of collecting and transferring funds, as well as collecting and transferring the necessary donor information to the political committee to allow them to satisfy their reporting obligations.

Draft B recognizes that "[i]n past Advisory Opinions, the Commission has concluded certain services that assist a contributor in making a contribution do not run afoul of the prohibition on corporations facilitating the making of contributions because certain electronic transactional services are so essential to the flow of modern commerce that they are akin to 'delivery services, bill-paying services, or check writing services.'" Draft B at 14 (quoting AO 2011-06 (Democracy Engine) (citing AO 2006-08 (Brooks))).

However, Draft B then incorrectly states: "Here, Repledge states in its request that it does not provide payment processing services to its subscribers." Draft B at 14. Repledge does provide payment processing services to its subscribers just as past requesters Democracy Engine and Brostin have.

In Democracy Engine, users visited Democracy Engine's website, selected a recipient for a contribution, selected an amount for the contribution, and then entered payment information and made the contribution. Democracy Engine deducted a service fee from the user's payment, processed the contribution through a merchant account, and placed the remaining balance in a bank account where it remained until it was forwarded to the recipient political committee. AO 2011-06 at 3.

This structure did not violate the prohibition on corporate facilitation. The Commission reasoned, "Because [Democracy Engine] will process contributions at the request and for the benefit of its subscribers, and not the recipient political committees, [Democracy Engine's] services are akin to delivery services, bill paying services, or check writing services for its subscribers, just as in Advisory Opinion 2006-08 (Brooks)." AO 2011-06 at 5.

The Repledge operational structure is very similar to the structure that was approved in Democracy Engine. The largest difference may be that Repledge provides less assistance to contributors making contributions than the system that was approved in Democracy Engine.

Just like in Democracy Engine, as soon as a user's card is charged, Repledge will deduct a service fee. When a Repledge user makes a contribution, their funds are split at the moment of payment, at the payment processing level, and sent to the final beneficiary of the contribution. Repledge will contract with and oversee the operations of the payment processor that will control the funds from when the members' credit cards are charged until the funds are received by the charitable organizations or political committee.

The operational structure maintained by Democracy Engine provided greater support and facilitation for payments than the system proposed by Repledge, yet was deemed by the Commission to fall short of "facilitation." The fact that Repledge will do less with respect to the transaction, by comparison to

Democracy Engine, means that Repledge's activities fall even further short of the legal standard for "facilitation."

Repledge respectfully requests that the Commission find that the electronic transactional services that Repledge provides its members, political committees and charitable organizations would not cause Repledge to violate the prohibition on a corporation "facilitating the making of contributions to candidates or political committees" at 11 CFR 114.2(f).

8. Repledge does not violate the prohibition on corporate facilitation of contributions because Repledge meets the "commercial vendor" exception.

A corporation does not facilitate the making of a contribution to a candidate if it provides goods or services in the ordinary course of business as a "commercial vendor" at the usual and normal fee. 11 CFR 114.2(f)(1). A "commercial vendor" is any person "providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those goods or services." 11 CFR 116.1(c).

In Advisory Opinions 2004-19 (DollarVote), 2002-07 (Cureau), and 2007-04 (Alltair) the Commission found that corporations could engage in collecting and forwarding online contributions to candidates as "commercial vendors." The Commission concluded that these corporations were "commercial vendors" as defined by 11 CFR 114.2(f)(1) because: (1) their services were provided in the ordinary course of business for the usual and normal charge; (2) they forwarded contributions to candidates through separate merchant accounts; and (3) the websites screened contributors to make sure that no illegal contributions were being forwarded.

Repledge will also be acting permissibly as a "commercial vendor." First, the arrangements between Repledge and the candidates will be commercially reasonable because Repledge will be acting in its ordinary course of business by providing a service to candidates—albeit a limited service—in the ordinary course of business. Repledge will transfer to candidates funds unsuccessfully diverted to charities, along with contributor's personal information necessary for the candidate to comply with federal law disclosure requirements.

Drafts A and B both incorrectly state: "Repledge will not provide any services to political committees." Draft A at 13 n.4; Draft B at 14-15 n.5. Repledge stated clearly in AOR 2012-08 that it "will be providing federal committees with the very limited service of providing a platform for sending contributions to federal committees that are not successfully diverted to charities." AOR 2012-08 at 12.¹

¹ As noted above, Repledge will not be engaged in "fundraising" but, nevertheless, to the extent the Commission deems Repledge to be facilitating the making of contributions, Repledge will be doing so

Eligibility for the "commercial vendor" exception does not require a corporation to provide "extensive" services or any particular quantity of services. The exception requires only that services, in the extent they are provided to a candidate, be provided in the ordinary course of business.

Fees deducted by Repledge from the funds received by the candidate are payments from the candidates to Repledge of the usual and normal charge of such an electronic transaction because they compensate Repledge for maintaining and operating its website, and include the credit card companies' costs of processing and forwarding the contributions.

Second, the funds intended for the political committees would transfer from the credit card to an account held by the payment processor that is exclusively used for this purpose. The funds would then transfer from the payment processor's account to the political committee or charity. The use of merchant accounts by prior requestors, *see* AOs 2004-19 (DollarVote), 2002-07 (Careau), and 2007-04 (Atlatl), were necessary to prevent political contributions from being commingled with corporate funds in the requestor corporations' general treasuries. No such merchant account is needed under Repledge's operational structure because Repledge will never have access to any of the funds transferred to committees.

In light of the factual situation presented in Advisory Opinion 2012-07 (Folstein for Senate) the Commission should look favorably upon this system, which provides complete transparency and accountability regarding the flow of funds from donors to the eventual recipient charities and political committees.

Finally, regarding the third component of the "commercial vendor" exception, Repledge will require all members who make a pledge to attest that any political contribution that results from their pledge is permissible under the Federal Election Campaign Act and Commission regulations. Repledge will also provide political committees with the necessary donor information to ensure that the political committees can satisfy their reporting obligations. Through this process, Repledge will also ensure that illegal contributions are not made through the Repledge platform.

Conclusion

We urge the Commission to find that Repledge is not engaged in fundraising activities and therefore does not violate the prohibition on corporations facilitating the making of contributions. If the Commission does determine that Repledge is engaged in fundraising, then we urge the Commission to recognize that Repledge's processing of contributions is akin "to delivery services, bill-paying services, or check writing services" and does not amount to "facilitation" under 11 CFR 114.2(f)(1). In the alternative, we urge the Commission to recognize that

"in the ordinary course of business, at a usual and normal charge"—charging the recipient committee for this limited service.

Repledge will provide a service to candidates—albeit limited—in the usual and normal course of business and is eligible for the “commercial vendor” exception under 11 CFR 114.2(f)(1) and 11 CFR 116.1(c).

For the foregoing reasons, existing federal campaign finance statutes, regulations, and precedents require the Commission to adopt Draft A, and reject Draft B.

We appreciate the opportunity to submit these comments.

Sincerely,



Noah Ornstein
On Behalf of Repledge

Copy to: Amy Rothstein, Assistant General Counsel and Theodore Lutz, Attorney, Office of General Counsel, Commissioner Caroline C. Hunter, Commissioner Ellen L. Weintraub, Commissioner Cynthia L. Bauerly, Commissioner Donald F. McGahn II, Commissioner Matthew S. Petersen, Commissioner Steven T. Walther